No. 7990

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United States
Circuit Court of Appeals
For the Ninth Circuit

W. J. DONALD, Receiver of the Nogales National Bank of Nogales, Arizona, an Insolvent Corporation,

Appellant,

vs.

E. K. CUMMING,

Appellee.

Brief of Appellant

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STATEMENT OF THE CASE

On January 12, 1935, the present appellant, W. J. Donald, as receiver of the Nogales National Bank, an insolvent corporation, filed his complaint in the office of the Clerk of the United States District Court for the District of Arizona, at Tucson, Arizona. The complaint alleged the organization of the bank under the laws of the United States and its operation as such until November 30, 1931, the Comptroller of the U. S. Currency determined it to be in an insolvent condition and appointed a receiver therefor; that W. J. Donald was the duly appointed, qualified and acting receiver therefor; that the defendant, E. K. Cumming, the present appel-

lee, was on January 14, 1932, the owner of capital stock to the par value of $1000.00; that on January 14, 1932, the Comptroller levied an assessment of 100% on the stockholders; that on January 30, 1932, written demand was made on the defendant for payment on or before February 23, 1932; that the defendant failed to pay.

On February 12, 1935, defendant demurred to the complaint on the ground that the liability was barred by limitation. At the hearing, on May 18, 1935, it was stipulated that the facts as set forth in the complaint were as stated and accordingly no evidence was offered. The demurrer was thereupon argued. Defendant admitted that the liability was generally contractual but that for purposes of limitation it was statutory and that the bar of the statute fell one year from the accrual of the cause of action. Plaintiff's position was that in the absence of a limitation in National Banking laws the three year limitation provided for Arizona banks by a special banking limitation as set forth in Sec. 227, Rev. Stat. 1928, Arizona, applied to the present case. Also, that the obligation was such a debt as to bring it within the three-year limitation as provided in Sec. 2060, Par. 1, in actions of "debt, where the indebtedness is not evidenced by a contract in writing."

Also that the obligation of the stockholder was an implied contract with the creditors of the bank and as such was within the same three-year limitation as provided in the section 2060, paragraph 1, as above set out.

The court took the matter under advisement and on June 10, 1935, entered an order sustaining the demurrer and dismissing the case. Exception was entered on behalf of the plaintiff.

ASSIGNMENT OF ERROR

I.—The District Court erred in sustaining defendant's demurrer to plaintiff's complaint for the reason that

The complaint was filed within the three-year period prescribed in Sec. 227 of the Rev. Statutes of 1928, Arizona, and which is as follows:

> "The stockholders of every bank shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such corporation or association, to the extent of the amount of their stock therein, in addition to the amount invested in such shares of stock. In case of the dissolution or liquidation of any bank, the constitutional and statutory liability of the stockholders must be enforced for the benefit of the creditors of such bank by the superintendent of banks or by any receiver.
>
> The action to enforce such liability shall be commenced within three years after the closing of such bank, and may be commenced immediately upon the closing of the bank, if in the judgment of the superintendent or receiver, the assets of such bank are insufficient to meet its liabilities."

and that the above and foregoing Section 227 expresses the intention of the Arizona legislature to create a three-year limitation for bank stockholders' liability in the case of all banks in Arizona;

and that in the absence of a provision for limitation in national banking laws, the Federal Courts should adopt the limitation as provided in Arizona laws.

II.—The District Court erred in sustaining defendant's demurrer to plaintiff's complaint for the reason that the complaint was filed within the three-year period prescribed in Section 2060, paragraph 1, of the Rev. Stat. of 1928, Arizona, and which is as follows:

> "There shall be commenced and prosecuted within three years after the cause of action shall have accrued, and not afterward, the following actions:
>
> I—Debt, where the indebtedness is not evidenced by a contract in writing."

That the stockholder's contract of subscription is an implied contract with the bank's creditors to be liable to the extent provided by law for all debts and engagements of the bank;

and that regardless of the exact nature of the stockholder's liability it is a "debt" as contemplated by the section last above quoted.

BRIEF OF ARGUMENT

The stockholder's liability dates from assessment and demand by the Comptroller of the U. S. currency and no cause of action accrues until assessment and demand have been so made.

Rankin v. Barton, 199 U. S. 228, 231;
Studebaker v. Perry, 184 U. S. 258, 263;
Rankin v. Miller, 207 Fed. 602, 610.

In the instant case assessment was levied on Jan. 14, 1932, and on Jan. 30th, 1932, demand for payment on Feb. 23, 1932, was made. The complaint was filed on Jan. 12, 1935.

Sec. 227 hereinbefore set forth expresses the obvious intention of the legislature to provide a three-year limitation for bank stockholders' liability, and the language employed "the stockholders of *every* bank" (italics mine) indicate a desire to include all stockholders of every bank in Arizona.

The word "every" means just what it says: The general, rather than limited meaning of the word bank is intended.

Gaiser v. Buck, 179 N. E. 1, 3, 5.

Since Congress has provided no limitation for the liability of bank stockholders, the laws of Arizona as to limitation are to be applied.

> "In the absence of any provision of the act of Congress creating the liability, fixing a limitation of time for commencing actions to enforce it, the statute of limitations for the particular state is applicable."
>
> McLaine v. Rankin, 197 U. S. 154, 158.

Inasmuch as there can be no right of action against the stockholders of a national bank until after assessment and demand by the Comptroller, it naturally follows that when sec. 227 (supra) is applied to the case of a national bank that closing, a loose expression at best, must be interpreted as assessment and demand.

The legislative intention to provide a three-year limitation in the case of *every* bank is thus carried out.

The intentions of the legislature should not be defeated by a too rigid adherence to a statute.

> Oates v. First Nat'l Bank, 100 U. S. 239, 244.
>
> "In a statute which contains valid and invalid provisions, that which is unaffected by those provisions or which can stand without them must remain. If the valid and invalid are capable of separation *only the latter are to be disregarded.*" (Italics mine.)
>
> Supervisors of Albany v. Stanley, 105 U. S. 305.

In the absence of a Federal statute of limitation for the double liability of national bank stockholders, a three-year limitation provided by state statutes can be applied without in any way interfering with the purposes of the Federal banks' creation, impairing its utility, or in any manner conflicting with Federal law. The provisions for a three-year limitation by the state is a definite, clear cut statement of the legislative intent as to stockholders of *every* bank in the state.

> "A National bank is subject to state law unless that law interferes with the purposes of its creation or destroys its efficiency or is in conflict with some Federal Law;"

and further

> "The doctrine of non interference with operations of a national bank protects the bank only from such legislation as tends to impair its utility as an instrument of the Federal Government."

First Nat'l Bank vs. Kentucky, 9 Wal. 353, 362;
McClellan v. Chipman, 164 U. S. 347, 356;
First Nat'l Bank of St. Louis v. Missouri, 263 U. S. 640, 656.

Anticipating the citing of Cowden v. Williams, 259 Pac. 670, 675, by appellee on this question of limitation, it is to be noted that the decision in that case was handed down prior to the adoption of the Arizona revised statutes of 1928, actually in 1929, and in particular, sec. 227 (supra) with its provisions for a three-year limitation. If the legislature has provided a three-year limitation for banks in this State Banking Act (sec. 227, supra), how can it be said that it intended a different period of limitation for national banks located within the state?

Sec. 227 above set out follows Section 5151 of the Rev. Stat. of U. S. almost word for word, except that Sec. 5151 provides no limitation. It would seem from the above cases that the Arizona three-year banking limitation as provided in Sec. 227 would naturally apply to any bank located in Arizona. Since national banking laws failed to provide a limitation for bank stockholders' liability it is not essential that the state laws on limitation express a clear cut intention to supply that particular omission before the Federal Courts will adopt the state limitation as controlling in the case of national banks located within the state. The fact that the national banking laws have not, and the state banking laws have such a limitation would seem to be sufficient warrant for Federal Courts to follow the state law.

THE OBLIGATION OF THE STOCKHOLDER IS AN IMPLIED CONTRACT WITH THE CREDITORS OF THE BANK AND AS SUCH IS WITHIN THE THREE-YEAR LIMITATION AS PROVIDED IN SECTION 2060, PARAGRAPH I, REVISED STATUTES ARIZONA 1928.

"Under the national banking act the individual liability of the stockholders is an essential element in the contract by which the stockholders become members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of the corporation. There is nothing in the statute to indicate that the obligation arising upon these undertakings and promises should not have the same force and effect and be as binding in all respects as any other contracts of the individual stockholder."

Richmond v. Irons, 121 U. S. 27, 56; 30 L. Ed. 864, 873.

"The obligation is declared by statute to attach to the ownership of the stock and in that sense may be said to be statutory. But, as the ownership of the stock, in most cases, arises from the voluntary act of the stockholder, he must be regarded as having agreed or contracted to be subject to the obligation."

Concord Bank v. Hawkins, 174 U. S. 364, 372; 43 L. Ed. 1007, 1011.

"The obligation of a subscriber to stock to contribute to the amount of his subscription for the purposes of payment of debts is contractual and arises from the subscription to the stock. . . . The obligation to respond is engendered by and relates to the contract from which it arises. This contract obligation, existing during life is not extinguished by death, but like other contract obligations survives and is enforceable against the estate of the stockholder."

Matteson v. Dent, 176 U. S. 521, 525; 44 L. Ed. 573.

"It may be regarded as settled that, upon acquiring stock the stockholder incurred an obligation arising from the constitutional provision, contractual in its nature, and as such, capable of being enforced in the courts, not only of that state but of another state and of the United States."

Whitman v. Bank, 176 U. S. 559, 563, 590.

Section 3, Article 10 of the Constitution of Minnesota, provides that: "each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing business) shall be liable to the amount of stock held or owned by him." An action to enforce this stockholder's liability came before the U. S. Supreme Court on a writ of error to the Circuit Court for the Southern District of New York. In a very lengthy opinion the question as to the nature of this liability is clearly set forth. The court said:

"the obligation of this contract binds the stockholder to pay to the creditors of the corporation an amount sufficient to pay the debts of the corporation which its assets will not pay, up to an amount equal to the stock held by each stockholder. It is substantially the procedure authorized by the National Banking Act except that the Comptroller of the Currency takes the place of the Court and without the presence of the stockholders makes a conclusive assessment. By becoming a member of a Minnesota corporation and assuming the liability attaching to such membership, he becomes subject to such regulations as the state might lawfully make to render the liability effectual. It may be regarded as settled that, upon acquiring stock, the stockholder incurred an obligation arising from the constitutional provisions, contractual in its nature, and as such capable of being enforced in the courts not only of that state but of another state and of the United States."

Bernheimer v. Converse, 206 U. S. 516, 529, 530; 51 L. Ed. 1163, 1174, 1175.

In a later case in the U. S. Supreme Court involving the same statute or rather, constitutional provision of the state of Minnesota, the court said:

"The provision is self executing and under it each stockholder becomes liable for the debts of the corporation in an amount measured by the par value of his stock. The liability is not to the corporation, but to the creditors collectively; is not penal, but contractual; is not joint, but several; and the mode and means of its enforcement are subject to legislative regulations."

Converse v. Hamilton, 224 U. S. 241, 253.

In the case of an action by the Superintendent of Banks for an assessment against the stockholders of the Bank of the U. S. the court said:

> "By article 8, sec. 7 of the Constitution (N. Y.) and sec. 120 and sec. 80 of the banking laws, stockholders of banking corporations are liable equally and ratably to the extent of the amount of their stock therein at the par value thereof for the debts and obligations of the bank. There is an implied contract voluntarily entered into by the stockholder upon his purchase of the stock of the corporation that he will be liable in the manner and to the extent prescribed by statute."

Van Tuyle v. Schwab, 174 App. Div. 665; 161 N. Y. S. 323, Aff'd 220 N. Y. 661; 116 N. E. 1081.

In the case of Fredericks v. Hammons, 33 Ariz. 310, 315, 264 Pac. 687, 689, while before the court primarily on a question of attachment, the court took advantage of the opportunity to pass on the nature of the stockholder's liability and the enforcement thereof. Inasmuch as the question of limitation goes to the remedy, the enforcement of the obligation, it seems impossible to escape the intendments of its decision that the liability is contractual and is to be enforced as such. On page 314 the court said:

> "The defendant contends that a stockholder's double liability does not arise out of a contract, but is statutory, and that at all events his liability is not for the direct payment of money. The first contention is not supported either by the text books or the decisions. According to these authorities, the stockholders' liability is contractual. The constitutional provisions at the time the defendant ac-

quired the stock was: the shareholders or stockholders of every banking or insurance corporation shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporation or association, to the extent of the amount of their stock therein, at the par value therefor, in addition to the amount invested in such shares of stock. This definitely fixed defendant's obligation. In accepting the stock he impliedly agreed to abide by such law. It became and was a part of the contract he entered into and he voluntarily gave his consent to be bound thereby."

The court then quoted Aaronson vs. Pearson, 199 Cal. 286, 249 Pac. 188, the same principle being expressed in Thompson on Corporations, 2d Ed. 4790, as follows:

"This liability is not imposed on stockholders without their consent, for the reason that, where such statute or constitutional provisional exists when a person becomes a stockholder in a corporation, he impliedly at least agrees to become liable to the extent prescribed. In other words, such a provision, under familiar principles, becomes incorporated in and a part of the undertaking of the stockholder, and is, therefore, said to be the result of his stockholder's agreement and is contractual in its nature."

"The constitutional and statutory provisions relating to the liability of stockholders become essential terms of the subscription agreement of a stockholder as fully as if they were set forth at length therein. By accepting ownership of stock in a corporation, the stockholder in effect offers to make payment, to the extent of his stockholder's liability, to any person who may extend credit to the corporation, the offer and act (of extending

credit) combined makes a complete contract between the stockholder and the creditor."

Quoting Adams v. Clark, 85 Pac. 642, 643, it said:

"This liability, unlike the liability imposed by the statute upon directors or officers of a corporation for its debts, because of their fraud or negligence in the management of the affairs of the corporation, is not penal in its nature—not to be regarded as a purely statutory liability—it is a liability voluntarily assumed by the act of becoming a stockholder, and an obligation thus assumed, is purely contractual, contains all the elements of a contract, and is to be enforced as such."

Continuing, the court said:

"This law is so well settled that we deem it unnecessary to cite other authority."

Fredericks v. Hammons, 33 Ariz. 310, 315; 264 Pac. 687, 689.

Apparently this is the first time that the proposition, that a bank stockholder's double liability was incurred by an unwritten contract, has been passed upon by the Arizona Supreme Court, but since then the Arizona Courts have followed and adopted that view. This will be noted in another and still more recent case of Colman v. Button, 42 Ariz. 141, 144; 22 Pac. (2d) 1078, 1079, which was an action to enforce the added liability of a bank stockholder, and wherein the court said:

"Sec. 227 of the Arizona Revised Code of 1928, reads, in part, as follows: 'the stockholders of every bank shall be held individually responsible, equally and ratably, and not one for another, for

all contracts, debts, and engagements of such corporation or association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares of stock. In case of the dissolution or liquidation of any bank, the constitutional and statutory liability of the stockholders must be enforced for the benefit of the creditors of such bank by the superintendent of banks or by any receiver.' The first sentence of this section is practically a rescript of section 11 Article 14, of the state Constitution, which is almost word for word the same as section 5151 of the Revised Statutes of the United States (12 U. S. C. A. 63) concerning the statutory liability of stockholders in the national banks. Incorporated in the contract of every purchaser and owner of shares of stock in a banking corporation are the provisions of the above statutes. These provisions are a part of his contract and he thereby agrees to the extent of the amount of his stock to be responsible to the creditors of the bank for all its contracts, debts and engagements."

Citing:

Mitche on Banks and Banking, Vol. 2, page 113, and

Coffin Bros. v. Bennett, 277 U. S. 29.

Quoting further from Wehby v. Spurway, 30 Ariz. 274, 246 Pac. 759, the court said:

"The question of the liability of the stockholder was under the Federal statute because of the similarity of that statute to our sec. 227 (supra) the conclusion there reached is, we think, decisive of the question here. The defense in that case was that the stockholder had been induced to purchase his stock through the fraud of an officer of the bank, and we held that even though such offense

were true it would not relieve the stockholder of his contractual liability to the creditors of the bank."

Colman v. Button, 42 Ariz. 141, 144.

From these cases it can hardly be denied that in the opinion of the Arizona Supreme Court the liability of the stockholder is contractual. Following the much quoted case of McLaine v. Rankin, 197 U. S. 154, where the decision of the U. S. Court was based on state of Washington decisions that the stockholder's liability was not contractual, it would seem that the court would be constrained to follow the Arizona decisions that the obligation is contractual, an implied contract that would inevitably bring it within the three year limitation as set out in Sec. 2060, par. 1, Arizona Rev. Statutes of 1928, actually adopted in 1929.

Turning to the decisions of Supreme Courts of other states we find case after case asserting the contractual nature of the stockholder's obligation and that it is to be enforced as such.

Hiring v. Hamlin, 200 Iowa 1322, 1326, 206 N. W. 617, 619;

Howarth v. Angle, 162 N. Y. 179, 56 N. E. 489, 492;

San Luis Obispo v. Gage, 139 Cal. 398, 405, 73 Pac. 174, 177;

Whittier v. Visscher, 189 Cal. 450, 209 Pac. 23, 25.

Again referring to Cowden v. Williams (supra) it is to be noted that the question of an implied contract, one

not in writing, was not even suggested to the court. There was bare mention of the bank charter being a written contract with a six-year limitation but the proposition was not urged and no authorities were cited. Certainly it can be said that until the case of Fredericks v. Hammons (supra) was before the Arizona Supreme Court that the question of whether or not the stockholder's liability was the result of an implied contract not in writing, had never been determined.

In the case of Washington Loan & Trust Co. v. Allman, 70 Fed. (2d) 282, the Circuit Court of Appeals quoted Fredericks v. Hammons (supra) as deciding that the liability of a stockholder in a bank organized under the laws of Arizona was contractual, and said:

> "Article 14, Section 11 of the Constitution of Arizona, provides that—The shareholders or stockholders of every banking or insurance corporation or association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporation or association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares or stock. The provision of the Arizona constitution to which we have referred has been considered by the Supreme Court of Arizona, and in the case of Fredericks v. Hammons (supra), was declared to be self executing and, without more, to impose double liability on all shareholders of a bank organized after its adoption. It is our duty to follow this construction. From this it follows that a purchaser of shares of stock in an Arizona bank voluntarily assumes, by the act of purchase, an obligation to become liable to the extent pro-

vided in the Arizona Constitution, *and such an obligation, obviously is contractual and may be enforced like any other contract.*" (Italics mine.)

Washington Loan & Tr. Co. v. Allman, 70 Fed. (2d) 282.

THE STOCKHOLDERS' LIABILITY OR OBLIGATION IS SUCH A DEBT AS WOULD BRING IT WITHIN THE PROVISIONS OF SECTION 2060, PARAGRAPH I, ARIZONA REVISED STATUTES OF 1928, AND WHICH IS AS FOLLOWS:

> "There shall be commenced and prosecuted within three years after the cause of action shall have accrued and not afterwards, the following actions:
>
> I—Debt, where the indebtedness is not evidenced by a contract in writing."

This statute is practically identical with Article 5526, Paragraph 4, of the 1925 Revised Statutes of Texas, and which is as follows:

> "there shall be commenced and prosecuted within two years 4—Actions for debt where the indebtedness is not evidence by a contract in writing."

It will be noted that the difference lies in the fact that the Texas statute provides for a two-year limitation and the Arizona statute provides for a three-year limitation.

In a recent Texas case, Jones v. Canon, 3 Fed. Supp. 49, 50, 51, which was an action to collect a national bank stockholder's 100% assessment, the court analyzed the case of McLaine v. Rankin (supra) and pointed out

that the decision in that case was based upon decisions by the Washington State Courts construing their own stockholders' liability as not contractual, whereas the Texas courts have held such liability to be contractual. By decisions of the Washington courts the word "liability" applied only to debts contractual in their nature. The Texas courts, however, with the same statute as Arizona's have held that the words "action for debt" embrace all liabilities payable in money only when not founded upon a writing, whether based upon a mere personal contract, a specialty debt, or a *strictly legislative liability.* (Italics mine.) Quoting from Gordon v. Rhodes, 102 Texas 300, 116 S. W. 40, 41, the court said:

> "It follows that if a cause of action be for a debt, in the sense of this statute, the debt need not be evidenced or founded upon contract at all to come within the two years statute."

The court further pointed out that in the case of Robinson v. Varnell, 16 Tex. 382, the Texas Supreme Court held that "action for debt" as used in the Texas limitation statute, is not the common-law action for debt in its strict literal interpretation.

Quoting another case in which the Texas banking Commissioner sought to collect a 100% assessment from a stockholder of an insolvent bank, the statute of limitations was pleaded as a defense. The court said:

> "The present action is for a debt not evidenced by a contract in writing. Article 5687, Revised Statutes of 1911, Texas, therefore applies, which provides that the action shall be commenced and prosecuted within two years after the cause of action has accrued."

Austin v. Proctor, 291 S. W. 702, 703.

It is to be again noted that this statute is like our Sec. 2060, paragraph 1, Rev. Stat. 1928. Quoting further:

> "In an older case, a suit to collect an improvement certificate issued by the City of Houston against the grantor of the defendant, the statute of limitations was pleaded. The court said:
>
> "Article 3203 requires actions for debt, where the indebtedness is not evidenced by contract in writing, to be brought within two years, and not afterward. . . . The word 'debt' as used in this article is not restricted to its technical or common-law meaning, but it has been declared by our Supreme Court to include any open, unliquidated claim for money."
>
> O'Connor v. Koch, 29 S. W. 400, 401.

In an action to enforce the statutory liability of bank officers for deposits made while the bank was insolvent, the Texas Supreme Court held that "the words 'actions for debt' embrace all liabilities in money only, when not founded upon a writing, whether upon a mere personal contract, or upon a specialty debt, or upon a strictly legislative liability."

> Rose vs. First State Bank, 38 S. W. (2d) 863, 864.

Referring to the decision in Rose v. Bank (supra) the court said:

> "The effect of this decision and others cited is to hold that the words 'action for debt' embrace all liabilities payable in money only when not founded upon a writing, whether based upon a mere personal contract, a specialty debt or a strict legislative liability. It follows that if a cause of action be for debt in the sense of this statute, the debt need

not be evidenced by or founded upon a contract to come within the two years statute."

Jones v. Canon, 3 Fed. Supp. 49, 50, 51.

In the instant case the statute so definitely passed upon by the Texas court being virtually the same as the Statute of Arizona, it would seem that the Arizona Statute has the same meaning and that the stockholders' double liability is such a debt as falls within the provisions of Section 2060, Paragraph 1, 1928, Revised Statutes of Arizona.

Even in uncertain cases the tendency of recent decisions seems obvious, for in a seeming attempt to do substantial justice to depositors and other creditors of an insolvent bank, the Court, in a suit to enforce the liability of bank directors, said: "As between two limitations, if a substantial doubt exists, the longer, rather than the shorter period is to be preferred."

Payne v. Ostius, 50 Fed. (2d), 1039, 1042.

CONCLUSION

It is respectfully submitted that the judgment of the District Court sustaining the appellee's demurrer and dismissing the case be reversed with instructions to the trial court to enter judgment for the appellant.

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